



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

GARVEY SMITH NEHRBASS & NORTH, LLC
LAKEWAY 3, SUITE 3290
3838 NORTH CAUSEWAY BLVD.
METAIRIE LA 70002

MAILED

AUG 13 2009

OFFICE OF PETITIONS

In re Patent No. 5,784,808 :
Issued: July 28, 1998 : REQUEST FOR
Application No. 08/714,964 : INFORMATION
Filed: September 17, 1996 :
Attorney Docket No. AD9027US (99413.1) :

This is a request for information in response to the petition under 37 CFR 1.378(e), filed April 30, 2009, to reinstate the above-cited patent.

Petitioner is allowed a non-extendable period for reply of **TWO (2) MONTHS** from the mailing date of this communication to provide a response. The response should be titled, "Response to Request for Information." If no response is provided within the period set forth, a decision will be made solely on the merits as set forth in the petition under 37 CFR 1.378(e) filed April 30, 2009.

The patent issued July 28, 1998. The 7.5 year maintenance fee could have been paid from July 28, 2005 to January 28, 2006, or with a surcharge, as authorized by 37 CFR 1.20(h), during the period from January 27, 2006, through July 28, 2006. Petitioner did not do so. Accordingly, the patent expired at midnight on July 28, 2006.

Petitioner is required to address the following points:

- It is noted that petitioner states that the docketing error that resulted in the failure to pay the 7.5 year maintenance fee occurred while attorney Richard Backus was responsible for paying the maintenance fee. It is further noted that Mr. Backus has indicated that he is not sure how the docketing error occurred. Thus, petitioner has not identified the cause of the error. Because Mr. Backus was charged with the responsibility of paying the 7.5 year maintenance fee, petitioner must establish that the actions, or inactions, of Mr. Backus unavoidably resulted in the 7.5-year maintenance fee not being paid. The statements as to Mr. Backus, and of Mr. Backus, do not establish that said delay was unavoidable. Petitioner states that the alleged failures of Mr. Backus' docketing system should not be imputed to the patentee. Petitioner is cautioned that it is well-settled legal precedence that, relative to petitions under 37 CFR 1.378(b), the actions, or inactions, of the duly appointed attorney are imputed to the client. Petitioner must, therefore, clarify under whose auspices the docketing error occurred. If, in fact, the docketing error occurred with Mr. Backus, petitioner must establish that the docketing error was the reason the 7.5-year maintenance fee was not paid and that said error was unavoidable.
- Petitioner is cautioned that there is a strong presumption that a docketing error cannot be considered unavoidable when the error was made by an attorney. If the error occurred under the clerical staff of Mr. Backus, petitioner must establish who that person was and how the docketing

error was unavoidable. Section 711.03(c)(2) of the Manual of Patent Examining Procedure, provides, in pertinent part that:

In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." *Haines v. Quigg*, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

- (A) the error was the cause of the delay at issue;
 - (B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and
 - (C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

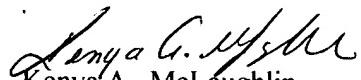
A delay resulting from an error, such a docketing error, on the part of an employee in the performance of a clerical function may provide the basis for a showing of unavoidable delay. Such a showing should identify the specific error, the individual who made the error, and the business routine in place for performing the action which resulted in the error. The showing must establish that the individual who erred was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. The showing should include information regarding the training provided to the personnel responsible for the docketing error, degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned task.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patent
Mail Stop Petitions
Box 1450
Alexandria, VA 22313-1460

By facsimile: (571) 273-8300
Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3222.



Kenya A. McLaughlin
Petition Attorney
Office of Petitions